Siah Teong Woei v Janet Traynor

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S8–33–789 OF 2006
SURAYA OTHMAN J
8 OCTOBER 2009

Family Law — Divorce — Domicile — Petitioner presented divorce petition after respondent filed for divorce in England — Decree nisi granted by English court — Whether both petitioner and respondent were domiciled in Malaysia when petitioner filed his divorce petition — Whether respondent abandoned her domicile of choice — Whether petitioner's petition ought to be struck off for disclosing no reasonable cause of action — Law Reform (Marriage and Divorce) Act 1976 s 48(1)(c)

Family Law — Divorce — Petition — Petitioner presented divorce petition after respondent filed for divorce in England — Decree nisi granted by English court on basis petitioner and respondent had lived apart for continuous period of five years immediately preceding presentation of respondent's petition — Respondent applied to strike off petitioner's petition — Whether Malaysian court had jurisdiction to hear petitioner's petition — Whether Malaysian court could recognise decree nisi granted by English High Court — Whether petitioner's petition ought to be struck off for disclosing no reasonable cause of action — Law Reform (Marriage and Divorce) Act 1976 s 49(b)(1)

The petitioner, a citizen of Malaysia and the respondent, a citizen of the United Kingdom were lawfully married in England on 18 August 1989. The parties then registered their marriage in Malaysia on 12 June 1990. There was one child of the marriage. In 2002, the petitioner and respondent separated and the respondent and her child left Malaysia for England and never returned. The respondent who presently resides in Surrey, England had since enrolled her son in school in England and took employment as a shop assistant to maintain herself and her child. On 14 September 2005, the respondent presented a divorce petition in England. The petitioner also filed a divorce petition in Malaysia in June 2006. On 20 April 2007, when the High Court in England made an ex parte injunction order directing that the petitioner's entire property in Malaysia be frozen, the petitioner obtained an ex parte order to stay the proceeding of the divorce petition filed by him pending the disposal of the divorce proceedings in England. On 12 July 2007, the respondent was granted a decree nisi in the English proceedings on the basis that the petitioner and respondent had lived apart for a continuous period of five years immediately preceding the presentation of the petition.

A Thereafter, the respondent filed the present application to strike out the petitioner's divorce petition on the grounds that a petition for divorce had already been filed in England in which a decree nisi had been granted and that this decree should be treated as final. The respondent also submitted that since the decree nisi was not granted by the Malaysian court it was not for the
B latter court to consider the merits or validity of the English decree nisi. In reply the petitioner submitted that the availability of an alternative forum was not a ground to strike out an action and that the decree nisi could be set aside because of its interim nature. The petitioner further submitted that the respondent was domiciled in Malaysia when the petition was filed and that
C by applying to strike out this action the respondent had accepted that she was domiciled in Malaysia. At the same time the petitioner also filed an application to set aside his own stay order and an application for an anti-suit injunction to restrain the respondent from proceeding with the English
D proceedings. The preliminary issue for the court in this case was whether it had the jurisdiction to hear and the power to grant the petition for divorce filed by the petitioner in June 2006.

Held, dismissing the petition and application with costs:

E (1) The basis for recognition of the decree nisi granted by the English High Court was the fact that the provision which the respondent wife used to get the decree nisi, ie s 13 of the Matrimonial Causes Act 1937 and the Law Reform (Miscellaneous Provisions) 1949, are in substance
F similar or pari materia to the Malaysian s 49(1)(b) of the Law Reform (Marriage and Divorce) Act 1976 ('LRA 1976'). By reason of s 13 of the Matrimonial Causes Act 1937 and the Law Reform (Miscellaneous Provisions) 1949 the English court had the jurisdiction to hear the respondent wife who had been ordinarily resident in England for a
G period of three years immediately preceding the commencement of the proceedings even though the husband was domiciled in Malaysia. Therefore, it would be contrary to principle and inconsistent with comity if the Malaysian courts were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves (see para 35).

H (2) In the alternative, if the respondent had not activated the English Law Reform (Miscellaneous Provisions) 1949 provision, which is similar to the Malaysian LRA 1976, she can still succeed to strike out the petition based on the fact that this court had no jurisdiction to entertain the petition since the respondent was not domiciled in Malaysia as required
I under s 48(1)(c) of the LRA 1976 when the petition was presented by the petitioner. All the respondent's actions since 2002 demonstrated a clear positive intention to permanently leave Malaysia and never to return and thus her abandonment of her domicile of choice, Malaysia, was unequivocal (see paras 36–37).

(3) The divorce petition disclosed no reasonable cause of action and ought to be struck off for an abuse of process under O 18 r 19 of the Rules of the High Court 1980. With the dismissal of the petition, the petitioner's application to set aside his stay order and his anti-suit injunction became redundant and ought to be dismissed (see paras 39–40).

[Bahasa Malaysia summary

Pempetisyen, warganegara Malaysia dan responden, warganegara United Kingdom telah sah berkahwin di England pada 18 Ogos 1989. Pihak-pihak kemudiannya mendaftarkan perkahwinan mereka di Malaysia pada 12 Jun 1990. Terdapat seorang anak hasil daripada perkahwinan itu. Pada tahun 2002, pempetisyen dan responden berpisah dan responden dan anaknya meninggalkan Malaysia untuk ke England dan mereka tidak pernah kembali. Responden yang kini menetap di Surrey, England telah mendaftarkan anaknya ke sekolah di England dan bekerja sebagai pembantu kedai untuk menanggung diri dan anaknya. Pada 14 September 2005, responden memfailkan petisyen perceraian di England. Pempetisyen juga memfailkan petisyen perceraian di Malaysia pada Jun 2006. Pada 20 April 2007, apabila Mahkamah Tinggi England membuat perintah injunksi ex parte membekukan kesemua harta pempetisyen di Malaysia, dia mendapatkan suatu perintah ex parte untuk menangguhkan prosiding petisyen perceraian yang difailkannya sementara menunggu penyelesaian prosiding perceraian di England. Pada 12 Julai 2007, responden diberikan satu dikri nisi atas prosiding di England atas dasar bahawa pempetisyen dan responden telah tinggal berasingan selama lima tahun berturut-turut sejurus selepas pemfailan petisyen perceraian tersebut. Kemudiannya, responden memfailkan permohonan ini untuk membatalkan petisyen perceraian pempetisyen atas alasan-alasan bahawa satu petisyen perceraian telahpun difailkan di England dan satu dikri nisi telah diberikan dan haruslah menjadi keputusan yang muktamad. Responden juga menghujahkan bahawa oleh sebab dikri nisi itu tidak dikeluarkan oleh mahkamah Malaysia, maka mahkamah Malaysia tidak boleh mempertimbangkan merit atau kesahan dikri nisi Inggeris tersebut. Sebagai jawapan, pempetisyen berhujah bahawa kewujudan forum alternatif bukanlah satu dasar untuk membatalkan sesuatu tindakan dan bahawa dikri nisi tersebut boleh diketepikan disebabkan oleh sifatnya yang interim. Pempetisyen seterusnya berhujah bahawa responden berdomisil di Malaysia apabila petisyen tersebut difailkan dan dengan memohon untuk membatalkan tindakan ini, responden telah mengakui bahawa dia sememangnya berdomisil di Malaysia. Pada masa yang sama, pempetisyen juga memfailkan suatu permohonan untuk mengenepikan perintah penangguhannya dan satu permohonan untuk satu injunksi anti-guaman bagi menghalang responden meneruskan prosiding di England. Isu awalan bagi mahkamah dalam kes ini ialah sama ada mahkamah mempunyai bidang

A kuasa untuk mendengar dan kuasa untuk memutuskan petisyen perceraian yang difailkan oleh pempetisyen pada Jun 2006.

Diputuskan, menolak petisyen dan permohonan dengan kos:

B (1) Dasar untuk pengiktirafan bagi dikri nisi yang diberikan oleh Mahkamah Tinggi England adalah peruntukan yang digunapakai oleh responden untuk mendapatkan dikri nisi tersebut, iaitu s 13 Matrimonial Causes Act 1937 dan Law Reform (Miscellaneous Provisions) 1949, yang mana intipatinya sama atau in pari materia C dengan s 49(1)(b) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta'). Berikutan s 13 Matrimonial Causes Act 1937 dan Law Reform (Miscellaneous Provisions) 1949, mahkamah Inggeris berbidang kuasa mendengar responden yang secara lazimnya menetap di England selama tiga tahun sejurus selepas meneruskan D dengan memulakan prosiding tersebut walaupun suaminya berdomisil di Malaysia. Maka, adalah bertentangan dengan prinsip dan bercanggah dengan sikap saling hormat-menghormati jika mahkamah di Malaysia tidak mengiktiraf satu bidang kuasa yang mutatis mutandis yang telah diterima (lihat perenggan 35).

E (2) Secara alternatifnya, jika responden tidak menggunapakai peruntukan dalam Law Reform (Miscellaneous Provisions) 1949 Inggeris tersebut, yang mana sama dengan Akta Malaysia, dia boleh membatalkan petisyen tersebut berdasarkan fakta bahawa mahkamah ini tiada bidang F kuasa untuk menangani petisyen tersebut kerana responden tidak berdomisil di Malaysia seperti yang dikehendaki oleh s 48(1)(c) Akta apabila petisyen tersebut difailkan oleh pempetisyen. Kesemua tindakan responden sejak 2002 menunjukkan niat yang jelas untuk meninggalkan Malaysia selama-lamanya dan tidak akan pulang dan G oleh itu, pengguguran domisil pilihannya, Malaysia adalah jelas (lihat perenggan 36–37).

(3) Petisyen perceraian itu tidak menunjukkan kausa tindakan yang wajar dan harus dibatalkan atas sebab pencabulan proses di bawah A 18 k 19 H Kaedah-Kaedah Mahkamah Tinggi 1980. Dengan pengenepian petisyen tersebut, permohonan pempetisyen untuk mengenepikan perintah penangguhannya dan injunksi anti-guamannya adalah bertindihan dan harus ditolak (lihat perenggan 39–40).]

I **Notes**

For cases on domicile, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3206–3216.

For cases on petition, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3282–3285.

Cases referred to

Ang Geck Choo v Wong Tiew Yong [1997] 3 MLJ 467; [1997] 3 CLJ 201, HC (refd)
Anthinarayana Mudaliar v Ajit Singh [1953] MLJ 229, HC (refd)
Bevington (otherwise Hewitson) v Hewitson [1974] Ont Rep LEXIS 195, HC (refd)
Herbert Thomas Small v Elizabeth Mary Small (Kerajaan Malaysia & Anor, interveners) [2006] 6 MLJ 372, HC (refd)
Indyka v Indyka [1969] 1 AC 33, HL (refd)
Melvin Lee Campbell v Amy anak Edward Sumek [1988] 2 MLJ 338; [1988] 1 LNS 19, HC (refd)
Tan Guan Hock v Khor Chai Heah [1990] 1 MLJ 422; [1990] 1 CLJ 308 (Rep), SC (refd)
Toon Boon Lee v Yeo Ah Beng [1986] 2 MLJ 276, HC (refd)
Travers v Holley and Holley [1953] 2 All ER 794, CA (refd)
Tsang & Ong Stockbrokers (Pte) Ltd v Joseph Ling Kuok Hua [2001] 5 MLJ 256, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 23, 24
Law Reform (Marriage and Divorce) Act 1976 ss 48, 49, 49(1)(a), (b)
Law Reform (Miscellaneous Provisions) 1949 [UK]
Matrimonial Causes Act 1899 [AU]
Matrimonial Causes Act 1937 [UK] s 13
Rules of the High Court 1980 O 18 r 19(1)(b), (c), (d)

Ng Sai Yang (Fadzillah Ismail with her) (Raja Darryl & Loh) for the petitioner.
Liew Teck Huat (TH Liew & Partners) for the respondent.

Suraya Othman J:

INTRODUCTION

[1] This is an application of the respondent by way of summons in chambers in encl 19 under O 18 r 19(1)(b), (c), and (d) of the Rules of the High Court 1980 ('RHC 1980') praying for the following order:

(a) that the petition herein be struck off;

(b) that the proceeding herein be dismissed with costs to be paid by the petitioner to the respondent;

(c) that the costs to and connected with the application herein be paid forthwith by the petitioner to the respondent; and

(d) for such further order or relief deemed fit by this honourable court.

[2] The respondent in her application laid down reasons and grounds for the application which are among others:

(a) that the marriage between the petitioner and the respondent was solemnised on 18 August 1989 in Weybridge, Surrey, England;

(b) that the respondent had presented a divorce petition in the Family Division of the High Court in England vide Matter No KT05D00693 on 14 September 2005;

(c) that save for issues relating to the division of assets and custody of the child of marriage Darren Siah Li Xiang that remain outstanding, a decree nisi was ordered on 12 July 2007 in the English proceedings;

(d) *that the respondent has left Malaysia and is no longer domicile in Malaysia*;

(e) *that the respondent presently resides in Weybridge, Surrey, England*;

(f) that the proceedings herein are frivolous, scandalous and/or are vexatious; and/or the proceedings herein will be an abuse of the court process; and

(g) that the proceedings herein will prejudice or embarrass the fair hearing and disposal of the English proceedings.

FACTS AND BACKGROUND

[3] Siah Teong Woei ('the petitioner') was lawfully married to one Janet Traynor ('the respondent') on 18 August 1989 in Weybridge, Surrey, England. The petitioner is a citizen of Malaysia and the respondent a citizen of the United Kingdom. The parties then registered their marriage in Malaysia on 12 June 1990. The marriage was blessed with a son Darren who was born in Malaysia on 13 April 1994. The respondent and the petitioner was separated in 2002 and she and the child Darren returned to England the same year. Since then she was no longer domiciled in Malaysia since she and Darren never returned to Malaysia after that date. Darren attended school in England and the respondent took employment as a shop assistant to maintain herself and the child.

[4] On 14 September 2005 the respondent filed a divorce petition against the petitioner in the Family Division in the High Court of England. At all times the petitioner had acted under advice in the English proceedings and he has been fully aware of the proceedings in England. The petitioner then filed a divorce petition herein (in Malaysia) sometime in June 2006. On 20 April 2007, the High Court in England made an ex parte injunction order directing that the entire petitioner's property in Malaysia be frozen. On 23 May 2007 the petitioner obtained an ex parte order staying the proceeding of the divorce petition filed by him in Malaysia pending the disposal of the

divorce proceedings in England. The High Court of England then granted a decree nisi of divorce on 12 July 2007. Subsequently on 5 October 2007 the respondent filed this summons in chambers to strike out the petitioner's divorce petition (present application, encl 19). The petitioner then filed a summons in chambers dated 19 March 2008 (encl 29) in this court to set aside his own stay order dated 23 May 2007. The petitioner further filed an application in this court for an anti-suit injunction by way of summons in chambers dated 9 April 2008 (encl 33) to restrain the respondent from proceeding with the English proceedings.

JUDGMENT OF THE COURT

[5] Counsel for the respondent submitted that the petition for divorce filed in Malaysia in June 2006 should be struck off on the ground that a petition for divorce has already been filed in England on 14 September 2005, in which a decree nisi has been granted by the English court on 12 July 2007. The decree nisi should be treated as final. In this regard, counsel for the respondent submitted the case of *Anthinarayana Mudaliar v Ajit Singh* [1953] MLJ 229, where Spencer Wilkinson judge held that:

> A judgment or decree pronounced by the court of a foreign country will be treated and acted upon here as final, notwithstanding any irregularity of procedure under the local law, provided the foreign court had jurisdiction over the subject matter and the person brought before it, and the proceedings do not offend against natural justice.

[6] Counsel for the respondent further submitted that this court must prevent the abuse and deny the petitioner a 'second bite at the cherry' as decided by Faiza Thamby Chik J in the case of *Herbert Thomas Small v Elizabeth Mary Small (Kerajaan Malaysia & Anor, interveners)* [2006] 6 MLJ 372. At held No 4 it is stated:

> The plaintiff husband had clearly submitted to the jurisdiction of the Australian courts by the filing of not one, but two, detailed affidavit in his defence and should therefore be stopped from inequitably taking a second bite at the cherry by instituting these Malaysian proceeding.

[7] Counsel for the respondent also submitted that the petitioner is abusing the court's process by voicing out his grievances before this court. The decree nisi is not granted by the Malaysian court and therefore it is not the function of the Malaysian court to consider the merits or validity of the English decree nisi. In the case of *Tsang & Ong Stockbrokers (Pte) Ltd v Joseph Ling Kuok Hua* [2001] 5 MLJ 256, the High Court in Kuching followed the decision of *Anthinarayana Mudaliar v Ajit Singh* and held as follows:

> It is also not the function of the court to consider the validity of the Singapore judgment. If the defendant is not satisfied with the judgment, he should go back to the Singapore High Court to challenge the validity of the judgment and the order for registration of the judgment will be revoked accordingly if the defendant succeeds. Unless this is done, a judgment or decree pronounced by the court of a foreign country will be treated and acted upon here as final, notwithstanding any irregularity of procedure under the local law, provided the foreign court had jurisdiction over the subject matter and the person brought before it, and the proceedings do not offend against natural justice.

[8] In replying to the above submission, counsel for the petitioner submitted that the availability of an alternative forum is not a ground to strike out an action at all. The fact that another action has been commenced is, at best, a basis to stay one set of proceedings. In this light, counsel for petitioner referred to the case of *Herbert Thomas Small v Elizabeth Mary Small (Kerajaan Malaysia & Anor, interveners)* to support his contention.

[9] Counsel for the petitioner further submitted that a decree nisi is, by its interim nature, can be set aside. The Singapore case in *Toon Boon Lee v Yeo Ah Beng* [1986] 2 MLJ 276 is illustrative. In setting out the history of the relationships between the parties, the court noted as follows:

> In London the defendant started divorce proceedings in the English court against the plaintiff in October 1979 (No 11319 of 1979) on the ground of five years separation and obtained a decree nisi on 2 January 1980. On the application of the plaintiff the court found her to be a thoroughly unreliable person and set aside the decree nisi on 27 February 1980 on the ground that the wife presented a false case to the court in the divorce suit for the purpose of obtaining a decree.

[10] The petitioner's counsel further argued that the respondent was domiciled in Malaysia when the petition was filed. The petitioner alleged that the respondent was not domiciled in England at the material time. The petitioner's counsel further submitted that by applying to strike out this action, the respondent had accepted the fact that she was domiciled in Malaysia. If not, she would not have been able to make this application.

[11] Having regard to the facts of this case and the above submissions, *the preliminary issue that this court has to consider is whether it has the jurisdiction to entertain the petition for divorce filed by the petitioner on June 2006 and the power to grant it.*

[12] Section 3 of the Courts of Judicature Act 1964 ('CJA') defines local jurisdiction as:

3 Interpretation —

'local jurisdiction' means —

(a) in the case of the High Court of Malaya, the territory comprised in the States of Malaya, namely, Johor, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territory of Kuala Lumpur; and

(b) in the case of the High Court in Sabah and Sarawak, the territory comprised in the States of Sabah, Sarawak and the Federal Territory of Labuan.

[13] It is also relevant to state s 23 of the CJA which reads:

Civil jurisdiction — general

23(1) Subject to the limitations contained in Article 128 of the Constitution *the High Court shall have jurisdiction to try all civil proceedings* where —

(a) the cause of action arose;

(b) the defendant or one of several defendants resides or has his place of business;

(c) the facts on which the proceedings are based exist or are alleged to have occurred; or

(d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

[14] Section 24 of the CJA is also pertinent. It reads:

Civil jurisdiction — specific

24 *Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include —*

(a) *jurisdiction under any written law relating to divorce and matrimonial causes*; (Emphasis added.)

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

A THE LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976

[15] The specific jurisdiction of the High Court to entertain divorce petitions is provided for in s 48 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) ('LRA 1976'). The said section read as follows:

B

Extent of power to grant relief

46(1) *Nothing in this Act shall authorize the Court to make any decree of divorce except*:

C (a) where the marriage has been registered or deemed to be registered under this Act; or

(b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and

D (c) *where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia*. (Emphasis added.)

DOMICILE

E **[16]** Section 48 of the Act provides that the court has the power to make a decree of divorce only where, inter alia, 'where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia'. Therefore, before any proceedings can be heard by this court, it must satisfy itself that the domicile of both parties were in Malaysia at the time the F petition was presented.

[17] In the Supreme Court decision in *Tan Guan Hock v Khor Chai Heah* [1990] 1 MLJ 422; [1990] 1 CLJ 308 (Rep), Gunn Chit Tuan SCJ at p 311e–f (as he then was) observed:

G

> ... The petitioner would still have to prove and satisfy the court that both he and the respondent were domiciled in Malaysia at the time when the petition was presented before the court could exercise its powers under s 48 of the Law Reform (Marriage and Divorce) Act to grant any relief to the parties.

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[18] Tan Thiaw Chong J in *Melvin Lee Campbell v Amy anak Edward Sumek* [1988] 2 MLJ 338; [1988] 1 LNS 19 also observed:

> The provisions of s 48(1)(c) in my view requires that the court must be satisfied I that at the time when the petition in the instant case was presented the domicile of both the petitioners was in Malaysia.

[19] In this case the High Court in Kucing held that the husband, a foreigner, even though he had married a native of Sarawak and had lived in

Malaysia since 1977 (for a period of over ten years before the joint petition for divorce was filed), and had intended to make Malaysia his permanent home, had failed to satisfy the court that at the time of the filing of the joint petition his domicile was in Malaysia. As a consequences, the court held that the court had no jurisdiction to entertain the joint petition.

[20] In the instant case, has the petitioner proved to this court that both he and the respondent were domiciled in Malaysia when he filed the petition for divorce in June 2006?

[21] It is not in dispute that the petitioner was domiciled in Malaysia when the petition for divorce was filed by him. But, the pertinent question is whether the respondent too was domiciled in Malaysia when the petition was filed?

[22] Referring to the *Oxford English Dictionary*, domicile means a place of residence or ordinary habitation, a house or home, the place where one has his permanent residence, *to which, if absent, he has the intention of returning*. In the light of this case, it is pertinent for this court to discuss on domicile of dependence as the respondent takes her husband's domicile upon marriage.

[23] In Malaysia, the law on domicile is similar to common law. As regard to a domicile of dependence, a woman takes the domicile of her husband upon marriage. In another word a married woman cannot acquire a domicile separate from that of her husband. A married couple have therefore, only one domicile and that is the domicile of the husband. The logic for this dependence is because under common law, a husband and a wife are viewed as one entity. The woman takes her husband's domicile upon marriage and she retains it. She can abandon her husband's domicile but she has to prove and satisfy the court that the abandonment is permanent and unequivocal before the court can take cognisance of it.

[24] In the local case of *Ang Geck Choo v Wong Tiew Yong* [1997] 3 MLJ 467; [1997] 3 CLJ 201, the petitioner (wife) a Singaporean was originally domiciled in Singapore but was married to the respondent whose domicile was Malaysia. She filed a divorce in the High Court of Malacca. Suriyadi Halim Omar J (as he then was) held that the court had jurisdiction to hear her petition because her domicile of origin (Singapore) had changed to that of dependence (domicile of choice) upon her marriage to her Malaysian husband, and since she has not abandoned her domicile of choice (Malaysia) she can petition for divorce in Malaysia. At held 5 it is stated:

> [5] The respondent not only had not succeeded in proving the animus but also the factum. The facts showed that when she was in Malaysia the petitioner

had already exercised her choice by making Malaysia her place of domicile. The petitioner cannot be said to have abandoned Malaysia as her place of domicile merely by her remaining a Singaporean and seeking employment the temporary period. The petitioner's return to Singapore was clearly due to the abusive behavior of the respondent. Her act was never pursuant to a free choice and therefore cannot be construed as unequivocal. There was also no evidence that the petitioner had 'burnt his boats' as to indicate a desire to permanently move back to her country of origin.

[25] Other than s 48 of the LRA 1976, the High Court is also conferred with additional jurisdiction. Section 49 of the LRA 1976 provide exceptions to the 'domicile test'. These exceptions are granted to a wife to avoid the injustices contingent upon the strict adherence to the application of the principle that a wife do not have and cannot acquire a separate domicile of choice. This is provided in cases where the proceedings for divorce are commenced by a wife and not by a husband. Section 49 of the LRA 1976 provide as follows:

Additional jurisdiction in proceedings by a wife

49(1) Notwithstanding anything to the contrary in section 48(1)(c) the court shall have jurisdiction to entertain *proceedings by a wife* under this part, although the husband is not domiciled or resident in Malaysia if:

(a) the wife has been deserted by the husband, or the husband has been deported from Malaysia under any law for the time being in force relating to the deportation of persons and the husband was before the desertion or deportation domiciled in Malaysia; or

(b) *the wife is resident in Malaysia and has been ordinarily resident in Malaysia for a period of two years immediately preceding the commencement of the proceedings*. (Emphasis added.)

[26] Before going any further, it is important to set out the development of the domicile principle in England. In England, this principle of domicile being the sole test of jurisdiction for divorce has been the result of judge made law and not statute. This ground for jurisdiction even though accepted and pronounced in a number of cases has never been laid down in any of the English statutes on matrimonial matters. In relevant developments, there are two enactments that have been made and subsequently affected the generality of the fundamental doctrine of domicile. These two Enactments are:

(a) Section 13 of the Matrimonial Causes Act 1937:

... where a wife has been deserted by her husband ... and the husband was immediately before the desertion ... domiciled in England and Wales, the court shall have jurisdiction ... notwithstanding that the husband has changed his domiciled since the desertion.

(b) The Law Reform (Miscellaneous Provisions) 1949 ('LR (MP) 1949'):

(1) The High Court in England shall have jurisdiction in proceeding by a wife for divorce, notwithstanding that the husband is not domiciled in England. If the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.

[27] After the amendments to the legislations, the English Court of Appeal in the case of *Travers v Holley and Holley* [1953] 2 All ER 794 decided that a decree of divorce given in the Court of New South Wales against a husband who had acquired a domicile of choice in New South Wales should be recognised in the English courts. The basis for the recognition was that the New South Wales Matrimonial Causes Act 1899 gave to a wife who had been domiciled in New South Wales for more than three years, the right to petition for divorce if her husband had without just cause willfully deserted her, a provision which was in substance similar to the English s 13 of the Matrimonial Causes Act 1937.

[28] Furthermore, in the said case of *Travers v Holley and Holley*, Somervell LJ stated at p 797A:

> On principle it seems to me plain that our courts in this matter should recognise a jurisdiction which they themselves claim.

[29] And Hodson LJ supported it at p 800D:

> ... it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves. The principle laid down and followed since *Le Mesurier v Le Mesurier* [1985] AC 528 must be in interpreted in the light of the legislation which has extended the power of the courts of this country in the case of persons not domiciled here.

[30] The decision of the House of Lords in *Indyka v Indyka* [1969] 1 AC 33 approved the decision in *Travers v Holley and Holley*. Lord Wilberforce held at p 105E–G:

> In my opinion, it would be in accordance with the developments and with the trend of legislation to recognise divorces given to the wives by the courts of their residence wherever a real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction. I use these expressions so as to enable the courts, who must decide each case, to consider both the length and quality of the residence and to take into account such other factors as nationality which may reinforce the connection.

[31] In this case, Lord Pearson was also of the view that nationality (if so taken by the foreign court) or a less exacting definition of domicile, ought to be grounds of jurisdiction, subject, however, to the limitation that there also be 'a real and substantial connection'. He stated at p 111E–F:

> It seems to me that, subject to appropriate limitations, a divorce granted in another country on the basis of nationality or on the basis of domicile (whether according to English case law or according to a less exacting definition) should be recognised as valid in England. *Also if the law of the other country concerned enables a wife living apart from her husband to retain or acquire a separate qualification of nationality or domicile for the purpose of suing for divorce, and the jurisdiction has been exercised on the basis of that qualification, that would not, normally at any rate, be a reason for refusing recognition*.

[32] In the case of *Bevington (otherwise Hewitson) v Hewitson* [1974] Ont Rep LEXIS 195, Lacourciere J, following the case of *Tavers v Holley and Holley* stated at the end of his judgment:

> I should mention one further point. *The development of the Travers v Holley doctrine and Indyka principle has, a large measure, occurred as a by-product of the rule that the domicile of a wife is at all times dependent upon the domicile of her husband. The rule has now been demolished*, in the context of domestic divorce jurisdiction, by s 6(1), and, in context of recognition, by s 6(2) of the Divorce Act. In my view, in relation to divorces granted to a wife after 1 July 1968, resort should first be had to this provision. *It will, I venture to suggest, solve the usual case where the wife leaves her husband and return to her pre-matrimonial home jurisdiction and there seeks the relief of divorce*.

[33] By referring to the above cases, it is crystal clear that by reason of the two Enactments namely; s 13 of the Matrimonial Causes Act 1937 and the Law Reform (Miscellaneous Provisions) Act 1949, in which extending the jurisdiction of the court to provide protection for deserted wives who prior to the desertion was domiciled in England and Wales, and also wives (whose husband may be domiciled elsewhere) who had resided in England for a period of three years immediately preceding the commencement of divorce proceeding, the Court of England would recognised a jurisdiction which they themselves claimed.

CONCLUSION

[34] In this instant case, it is an undeniable fact that the respondent and the child of the marriage, Darren, had moved back to England in 2002 and they had never returned to Malaysia since then. On 12 July 2007, the High Court of England granted a decree nisi of divorce on the basis that the petitioner and respondent had lived apart for a continuous period of at least five years

immediately preceding the presentation of the petition, and the said court has jurisdiction as the respondent is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings. Thus, it is also clear that the respondent had activated the LR (MP) 1949 provision to protect her rights as manifested by the abovementioned section.

[35] It may be summed up that these two English provisions (s 13 of the Matrimonial causes Act 1937 and the LR (MP) 1949) are in substance similar to the sections set out in our s 49(1)(a) and (b) of the LRA 1976. Thus, by reason of the principle set out in s 47 of the LRA 1976 as set forth:

> 47 Principles of law to be applied
>
> Subject to the provisions contained in this Part, the Court shall in all suits and proceeding hereunder act and gives relief on principles which, in the opinion of the court are, as nearly as maybe, conformable to the principles on which the High Court of Justice in England acts and gives reliefs in matrimonial proceedings.

this court is of the opinion that Malaysian court should apply the abovementioned English principles as the basis for recognition of a foreign decree of divorce. This is because there should be reciprocity of treatment so that recognition should be given to a divorce obtained in the exercise of a jurisdiction substantially similar to that exercised by the Malaysian court. In other words, the basis for recognition of the decree nisi granted by the English High Court is due to the fact that the provision which the respondent wife used to get the decree nisi is in substance similar or 'pari materia' to our s 49(1)(b) of the LRA 1976 and therefore it would be contrary to principle and inconsistent with comity if the Malaysian courts were to refuse to recognise a jurisdiction which, mutatis mutandis, they claim for themselves.

[36] In the alternative, if the English LR (MP) 1949 provision which in substance is similar to our s 49(1)(b) of the LRA 1976 is not activated by the respondent (wife), this court is of the opinion that she can still succeed to strike out the petition based on the fact that this court has no jurisdiction to entertain the petition since the respondent at the time the petition was presented by the petitioner was not domiciled in Malaysia as required under s 48(1)(c) of the LRA 1976.

[37] As averred to earlier, it is an undeniable fact that the respondent was separated from the petitioner in 2002 and in the same year, she and her child Darren left Malaysia for England and never returned. On 14 September, 2005, she presented a divorce petition in the Family Division of the High

A Court of England and was granted a decree nisi on 12 July 2007. She enrolled her son in school in England and took employment as a shop assistant to maintain herself and her child.

B **[38]** All her actions since 2002 clearly demonstrated a clear positive intention to permanently leave Malaysia and never to return. This court in good conscience is satisfied that her abandonment of her domicile of choice (Malaysia) is unequivocal.

C **[39]** Therefore having considered all the above, this court allowed prayer 1 and 2 of encl 19 ie that the divorce petition filed by the petitioner in June 2006 be struck off for disclosing no reasonable cause of action and for an abuse of process under O 18 r 19 of the RHC 1980. Prayer 3 on costs is also allowed but to be taxed.

D **[40]** With the dismissal of the petition, encll 29 and 33, both the petitioners summons in chambers to set aside his stay order dated 23 May 2007 and his anti-suit injunction dated 9 April 2008 are redundant and therefore dismissed with costs.

E **[41]** Order accordingly.

Petition and application dismissed with costs.

F Reported by Kohila Nesan

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